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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 242

KENOSHA MOTOR COACH LINES, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

APPELLEES' STATEMENT OPPOSING JURISDICTION

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Pursuant to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the appellees, Public Service Commission of Wisconsin, J. G. Van Holten & Sons, Inc., General Electric Co., et al. (intervenors) jointly file this statement opposing jurisdiction.

Nature of the Case

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin upholding the jurisdiction of the Public Service Commission of the State of Wisconsin to

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order an electric interurban railway, located wholly within the State of Wisconsin, and which is not a part of a general steam-railroad system, to restore a connecting interstate freight service between certain points within the state, which service it had abandoned. The judgment construes Section 196.81, Wisconsin Statutes, which provides in substance that no railroad shall abandon or discontinue any line or service thereon without prior approval of the Public Service Commission of Wisconsin. The judgment determines that the federal government did not pre-empt the field, and that under Section 1(22), Interstate Commerce Act; 49 U. S. C. A. 1(22), the Interstate Commerce Commission's authority does not extend to the abandonment of an interurban electric railway not operated as a part of a general steam railroad system of transportation.

The judgment appealed from was rendered April 12, 1949, and a motion for rehearing was denied June 7, 1949. It is a final judgment for purposes of appeal to this Court.

Questions Involved

The appellant in its assignment of error contends that three federal questions are involved. Its contentions may be reduced to the statement of two questions. They are:

First: Whether Sec. 196.81, Wisconsin Statutes, as construed by the Wisconsin Supreme Court, is invalid as an invasion of a field exclusively occupied by the federal government under the Interstate Commerce Act and the Interstate Commerce clause of the United States Constitution.

Second: Whether the order of the Wisconsin Public Service Commission requiring restoration of interstate freight service deprived appellants of rights protected by the Fourteenth Amendment of the Federal Constitution by compelling it to render such service without providing compensation therefor.

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Statement of Facts

Kenosha Motor Coach Lines, Inc. (hereinafter called "the carrier"), prior to September 10, 1947, operated an electric interurban railway line extending between three municipalities located within the state of Wisconsin comprising what is known as the Milwaukee-Waukesha-Hales Corners operation. The carrier neither owned nor operated any railway properties outside the state of Wisconsin, nor did it operate as a part or parts of a general steam railroad system of transportation. The business transacted by the Milwaukee-Waukesha-Hales Corners interurban was primarily an intrastate passenger business. There was no interstate passenger business. During the first ten months of 1947 only 1.78% of its total gross revenues were derived from freight business. The freight business was both intrastate and interstate. Since the rails and other facilities of the carrier were located entirely within the state of Wisconsin, the interstate freight service was rendered through transfer of carload shipments with interstate steam railroads operating into the city of Milwaukee.

Pursuant to the requirements of Section 6(1) of the Interstate Commerce Act (49 U. S. C. A. 6(1), App. p. 14) the carrier, prior to September 10, 1947, had filed with the Interstate Commerce Commission rates applicable to shipments between points on its line and points served by it outside the state through connections with the lines of other carriers.

On September 10, 1947 the carrier filed with the Interstate Commerce Commission certain documents purporting to cancel all interstate freight tariffs to which it was then a party. The cancellations were to become effective on November 15, 1947. Following receipt of the cancellations and on October 1, 1947 the Director of the Interstate Com-

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merce Commission wrote a letter to the carrier which, in part, stated:

> "After the effective date of the above-mentioned cancellation notices your company would have no tariffs on file under which it could engage in interstate commerce. The effect, therefore, would be to abandon the operation of the line as to interstate commerce. This is to advise you that such an abandonment may not be lawfully accomplished unless and until appropriate authorization has been obtained from this Commission pursuant to the provisions of Section 1(18) of the Interstate Commerce Act.
>
> "If it is your purpose to discontinue operation of the lines involved as to interstate and foreign commerce an appropriate application should be filed as provided by the Commission's order of November 27, 1941, a copy of which is enclosed herewith. In the meantime consideration will be given to suspending the schedules in question on the Commission's own motion under the authority of section 15(7) of the Interstate Commerce Act."[1]

Thereafter the Interstate Commerce Commission, by an order entered October 9, 1947, suspended the cancellation of the tariffs pending an investigation into the lawfulness of the cancellation.

On January 19, 1948, pursuant to the suggestion in the Interstate Commerce Commission's letter of October 1, the carrier filed with that Commission an application under the provisions of Section 1(18) of the Interstate Commerce Act to abandon interstate freight service. At the same time it filed an application for a vacation of the Commission's order of October 9 suspending the cancellation of interstate freight tariffs.

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[1] "Sections 1 (18) and 15 (7) of the Interstate Commerce Act, to which reference was made in the Commission's letter, are set out at App. pp. 13 and 15.

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In filing the application to abandon under Section 1(18) of the Interstate Commerce Act the carrier did not, however, concede the jurisdiction of the Interstate Commerce Commission under that section to grant or deny authority to abandon. On the contrary, both in the application to abandon and in the application to vacate the Commission's suspension order of October 9, the carrier insisted that by reason of the provisions of Section 1(22) of the Interstate Commerce Act (49 U. S. C. A. 1(22), page 9 post) the Commission was without jurisdiction to pass upon its abandonment of interstate freight service. The contentions were thus stated:

In the application to abandon:

> "Applicant is a carrier by railroad subject to certain of the provisions of the Interstate Commerce Act but contends that under the exemptions contained in Section 1(22) of said Act, it is not subject to the provisions of paragraph 18 of Section 1 thereof by virtue of its being an interurban electric railway, not operated as a part of a general steam railroad system of transportation."

In the application to vacate the suspension order:

> "Based on the foregoing, petitioner contends that as the lines of electric railway over which it seeks to abandon interstate service by the tariffs under suspension are, and in the past have been operated only as a suburban or interurban electric railway, and not as a part of a general steam railroad system of transportation, under the plain statutory exemption granted in Section 1(22) of the Act, it was and is unnecessary for it to obtain authority to abandon such freight service, and that therefore in entering its order of October 9, 1947, suspending the tariffs enumerated in such order, thereby requiring petitioner to continue such existing freight service and preventing it from abandoning such service, the Commission exceeded its jurisdiction and statutory authority."

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On February 27, 1948 the Interstate Commerce Commission dismissed the carrier's application of January 19 to abandon interstate freight service. The order reads:

> "Upon consideration of the applications filed in these proceedings by the Kenosha Motor Coach Lines, Inc., for permission to abandon operation of its lines or railway in interstate commerce and of the facts and circumstances presented by said applicant in said applications; and said division having concluded that the lines in question are of the character specified in section 1(22) of the Interstate Commerce Act, namely, street, suburban, or interurban electric railways not operated as a part or parts of a general steam railroad system of transportation;
>
> "It is ordered, That said applications be, and they are hereby, *dismissed for want of jurisdiction.*" (Emphasis ours.)

Thereafter, on March 12, 1948, pursuant to the carrier's petition of January 19, the Interstate Commerce Commission, without a recitation of its reasons, vacated its suspension order of October 9 and dismissed the inquiry which it had instituted into the lawfulness of the tariff cancellations.

The carrier abandoned interstate freight service on the Milwaukee-Waukesha-Hales Corners line on May 5, 1948. Van Holten and other interested shippers then instituted the proceeding before the Wisconsin Public Service Commission. On September 1, 1948, the Wisconsin Commission issued an order requiring the carrier to restore the interstate freight service which it had abandoned. The carrier applied for a rehearing, which was denied September 17, 1948.

On October 5, 1948 the carrier instituted a proceeding under Chapter 227, Wisconsin Statutes, 1947 (Administrative Review) in the Circuit Court for Dane County, Wisconsin, to review the Wisconsin Public Service Commission's order

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of September 1, 1948. After hearing that court issued its memorandum decision, and rendered judgment upon findings of fact and conclusions of law, vacating the Commission's order. Appeal to the Supreme Court of the state of Wisconsin was duly taken, resulting in the judgment of that court from which the present appeal is taken.

Statutes Involved

The following provisions of state and federal statutes are involved:

Section 196.81, Wisconsin Statutes, 1947:

> "Abandonment; commission approval required. No public utility or railroad as defined in chapters 195 and 196 shall abandon or discontinue any line, branch line or extension or service thereon without first securing the approval of the commission. In granting its approval, the commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Any public utility or railroad abandoning or discontinuing in pursuance of authority granted by the commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the commission in that regard. Nothing herein contained, however, shall be construed to eliminate the necessity of obtaining the consent of the proper municipal authorities as required by section 193.11. The provisions of this section shall apply only so far as the constitution and laws of the United States permit."

Section 1(22), Interstate Commerce Act; 49 U. S. C. A. 1(22):

> "*Construction, etc., of spurs, switches, etc., within State.* The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or

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to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Note: The following statutes which are indirectly involved, and to which this Court may wish to make reference, are set forth in the appendix hereto for convenient reference:

Section 1(18), Interstate Commerce Act; 49 U. S. C. A. 1(18).

Section 1(20), Interstate Commerce Act; 49 U. S. C. A. 1(20).

Section 6(1), Interstate Commerce Act; 49 U. S. C. A. 6(1).

Section 6(7), Interstate Commerce Act; 49 U. S. C. A. 6(7).

Section 15(7), Interstate Commerce Act; 49 U. S. C. A. 15(7).

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

I. State Court Decision Will Not Be Reviewed Where Asserted Federal Question Settled by Previous Decisions.

It is respectfully submitted that in view of the previous decisions of this Court hereinafter cited, the questions stated by appellant are so wanting in substance as not to need further argument. The Supreme Court of the United States will not review a state court decision where the asserted federal question is contrary to the established law as settled by its decisions.

City of Boston v. *Jackson*, 260 U. S. 309, 43 S. Ct. 129, 67 L. Ed. 274 affirming (1921), 237 Mass. 403, 130 N. E. 390;

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Easterling Lumber Co. v. *Pierce*, 235 U. S. 380, 59 L. Ed. 279, 35 S. Ct. 133, dismissing appeal, 106 Miss. 672, 64 So. 461;

Manhattan Life Ins. Co. of New York v. *Cohen*, 234 U. S. 123, 58 L. Ed. 1245, 34 S. Ct. 874, dismissing appeal (Tex. Civ. App.), 139 S. W. 51.

II. Power of Congress to Confide Regulation of Essentially Local Activities to the States as Exercised in the Enactment of Sec. 1 (22) Interstate Commerce Act Clearly Settled by Decisions of This Court.

By the very enactment of Section 1(22) Interstate Commerce Act; 49 U. S. C. A. 1(22), Congress has clearly shown its intention that the abandonment of a service such as here involved is excluded from the jurisdiction of the Interstate Commerce Commission and confided to the control and regulations of the states. Operations of the character involved in this case fall within the area of concurrent jurisdiction of the federal and the state government.

> ". . . The precise line between transactions directly affecting interstate commerce which the Federal Government may control and those only indirectly affecting interstate commerce to which the power conferred by the commerce clause of the Federal Constitution does not extend can be drawn only as individual cases may arise. The question necessarily is one of degree. . . ." 11 Am. Jur. 17, § 15.

The power of Congress to confide the regulation of activities such as described in Section 1(22) Interstate Commerce Act; 49 U. S. C. A. 1(22) to the states has been accepted and clearly recognized by this Court in many cases. The philosophy of such decisions has been succinctly expressed in this language in *City of Yonkers* v. *United States*, 320 U. S. 685, at 690, 64 S. Ct. 327, at 330, 88 L. Ed.

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400 at 403, where this Court, speaking through Justice Douglas, said:

> ". . . The exemptions contained in § 1(22) do not necessarily reflect the lack of constitutional power to deal with the excepted phases of railroad enterprise. Underlying § 1(22) is a Congressional policy of reserving exclusively to the states control over that group of essentially local activities. See H. Rep. No. 456, 66th Cong., 1st Sess., p. 18. We recently stated that the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.' Palmer v. Massachusetts, 308 U. S. 79, 84, 60 S. Ct. 34, 36, 84 L. Ed. 93. . . ."

That the states may exercise regulatory power in the face of the clear surrender of such power by Section 1(22) Interstate Commerce Act; 49 U. S. C. A. 1(22), was also recognized in *Western & Atlantic R. R.* v. *Georgia Public Service Commission,* 267 U. S. 493, 45 S. Ct. 409, 69 L. Ed. 753.

III. As Used in Sec. 1 (22 (Interstate Commerce Act, the Term "Abandonment" Contemplates a Mere Discontinuance of Service.

Appellant makes a strained attempt to avoid the impact of cases such as the *Yonkers* case, *supra,* by suggesting a distinction between a discontinuance of service from a "physical abandonment," which it implies to include "pulling up the rails." This contention has been clearly disposed of in *State of Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 42 S. Ct. 281, 66 L. Ed. 566, and accordingly is without merit.

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IV. The Provisions of Section 1 (22) of the Interstate Commerce Act Apply Notwithstanding the Fact That Interstate Rates Are Involved.

It is to be freely conceded that under *State of Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 44 S. Ct. 247, 68 L. Ed. 569, the abandonment of interstate service by the carrier in this case would have been subject to the jurisdiction of the Interstate Commerce Commission, were it not for the provision of Section 1(22) of the Interstate Commerce Act.

The very purpose of Section 1(22) is to remove from Interstate Commerce Commission jurisdiction, and to vest in the states, control over the construction and abandonment of the activities falling within its provisions.

The appellant argues that because interstate tariffs are involved, the abandonment does not fall within the purview of Section 1(22). The dissenting opinion of the Wisconsin Supreme Court also subscribed to that view since it states that, "Because interstate rates are necessarily involved the Interstate Commerce Commission has exclusive jurisdiction and the so-called exclusion clauses of the Interstate Commerce Act do not apply." Our research has brought to light two cases which indicate conclusively that the exclusion provisions of Section 1(22) are applicable, notwithstanding the fact that interstate rates are involved.

See *U. S. et al.* v. *State of Idaho*, 298 U. S. 105, 56 S. Ct. 690, 80 L. Ed. 1070, and

U. S. v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, 53 S. Ct. 245, 77 L. Ed. 583.

V. The Order of the Public Service Commission of Wisconsin Does Not Violate Art. XIV, Sec. 1 of the Constitution of the United States.

Appellant asserts that the order of the Public Service Commission of Wisconsin requiring it to restore service "without compensation" is in violation of the Fourteenth

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Amendment to the Constitution of the United States. The argument is specious. While it is illegal to operate as an interstate carrier without filing of rates, the appellant can and should file rates prior to instituting service. If it had disposed of some of its physical assets following summary abandonment of its service (such as locomotives or cars), and as a result of the order, had to purchase new equipment, such incidental requirement could not be said to constitute the rendering of service "without compensation," since it is implicit that the composition of the rates would necessarily depend upon cost of acquiring and maintaining equipment, as well as defraying cost of operation of the system, and presumably would afford a reasonable return on investment. The Wisconsin Commission's order is wholly consistent with the exclusive jurisdiction of the Interstate Commerce Commission to approve the rates, when filed.

Conclusion

From the foregoing it appears that no substantial federal question is here presented and that the Supreme Court of Wisconsin so held correctly.

Respectfully submitted,

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APPENDIX

The following quoted statutes are pertinent to the questions involved and are set forth for convenient reference:

Section 1(18), Interstate Commerce Act; 49 U. S. C. A. 1(18):

> "*Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1(20), Interstate Commerce Act; 49 U. S. C. A. 1(20):

> "*Issuance of certificate by commission; unlawful extension or abandonment of lines.* The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, com-

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ply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Section 6(1), Interstate Commerce Act; 49 U. S. C. A. 6(1):

"*Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules

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or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

Section 6(7), Interstate Commerce Act; 49 U. S. C. A. 6(7):

"*Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15(7), Interstate Commerce Act; 49 U. S. C. A. 15(7):

"*Commission to determine lawfulness of new rates; suspension; refunds.* Whenever there shall be filed with

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the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *"